No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF CEMETERY LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF CEMETERY LAW SCHOLARS AS *AMICI CURIAE*

The undersigned cemetery law scholars respectfully submit this brief as *amici curiae*.[1]

INTEREST OF *AMICI CURIAE*

In this case, this Court is asked to opine on certain procedures for properly raising a takings claim in federal court. Although the Court's focus is on *Williamson County Regional Comm'n v. Hamilton Bank*,[2] the underlying dispute concerns an ordinance that purports to recognize burial grounds and permit the public certain rights to access them. *Amici* have no personal stake in the outcome of this case; they are legal scholars whose research, writing, and teaching has focused on cemetery law. *Amici* submit this brief because they recognize that an understanding of the unique common law real property doctrines that apply to burial grounds may be useful to the Court in this matter.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), all appropriate parties have filed letters granting blanket consent to the filing of *amicus curiae* briefs.

[2] 473 U.S. 172 (1985).

Joining in this brief as *amici* are:

Tanya D. Marsh is a Professor of Law at Wake Forest University School of Law in Winston-Salem, North Carolina. Professor Marsh is the author of the first treatise on the law of the dead published since 1950, *The Law of Human Remains* (2015) and the co-author, with her former student Daniel Gibson, of *Cemetery Law: The Common Law of Burying Grounds in the United States* (2015). Professor Marsh has written several law review articles on relevant topics, including *When Dirt and Death Collide: Legal and Property Interests in Burial Places*,[3] which explains the structure of common law legal and property interests in burial places in the United States. Professor Marsh also teaches the only course in Funeral and Cemetery Law in a United States law school.

Ryan M. Seidemann is the Chief of the Lands & Natural Resources Section, Office of the Attorney General, Louisiana Department of Justice. Mr. Seidemann is a Registered Professional Archaeologist and a lawyer whose practice representing the Louisiana Cemetery Board and the Louisiana State Archaeologist focuses on cemetery and archaeological law. Mr. Seidemann is an adjunct professor of law at Southern University Law Center in Baton Rouge, Louisiana, where he teaches, among other things, property law. During his career, Mr. Seidemann has authored more than 80

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[3] Prob. & Prop., March/April 2016.

publications on cemetery law, property law, environmental and natural resources law, and anthropology, the most recent of which appeared in the *William & Mary Environmental Law and Policy Review* and focused on the ancient nature of cemetery site protection laws in the United States.[4]

SUMMARY OF ARGUMENT

In 2012, Scott Township, Lackawanna County, Pennsylvania ("the Township") adopted Ordinance 12-12-20-001 which, among other things, grants the public the right to access cemeteries located on private land in the Township during daylight hours.[5] Ms. Knick's Petition for Writ of Certiorari characterizes the Ordinance as "a burden that abridges her fundamental right to exclude others and which violates this Court's physical takings precedent."[6] Ms. Knick emphasizes that when she purchased the land in 1970, her title did not reflect the presence of a burial ground on the property, that "there is no official state registration of a cemetery," and "she was not aware of any physical sign of a burial ground."[7] The Third Circuit seemed sympathetic to Ms. Knick's concerns about the Ordinance,

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[4] Ryan M. Seidemann, *Requiescat In Pace: The Cemetery Dedication and Its Implications for Land Use In Louisiana and Beyond*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 895 (2018).

[5] Ordinance 12-12-20-001 § 5 (Dec. 20, 2012).

[6] Petition for Writ of Certiorari at page 4.

[7] *Id.* at 6.

stating that the Ordinance is "extraordinary" and "constitutionally suspect."[8]

At the heart of the dispute between Ms. Knick and the Township is the question of whether the Ordinance constitutes a taking. Neither of the parties focused on this issue in their respective briefs to either the District Court or the Third Circuit, instead focusing on the procedural issues. Indeed, there is no precedent for Ms. Knick's claim that a taking has occurred because longstanding common law doctrines provide that landowners do *not* have the right to exclude all others from burial grounds located on private land.[9] Regardless of the language in the deed granting title to Ms. Knick, regardless of any "registration," and regardless of any physical signs of a burial ground, it is a well-established principle of common law that once human remains are intentionally placed in real property, such real property and all subsequent owners are burdened by encumbrances in favor of the dead, the kin of the

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[8] *Knick v. Twp. of Scott*, 862 F.3d 310, 314 (3d Cir. 2017), *cert. granted in part sub nom. Knick v. Twp. of Scott, Pa.*, 138 S. Ct. 1262, 200 L. Ed. 2d 416 (2018).

[9] *Stockton v. Weber*, 33 P. 332 (Cal. 1893) ("A single burial will entitle the interred cadaver to protection, and land containing a human being will be maintained inviolate.").

dead, and the public.[10] The Ordinance is hardly "extraordinary"—most of the provisions contained therein simply restate rights already reserved at common law. Whether the Ordinance extends beyond the common

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[10] *Concordia Cemetery Ass'n v. Minnesota, etc., Ry.*, 12 N.E. 536 (Ill. 1887) ("What creates the cemetery is the act of setting the ground apart for the burial of the dead, marking it, and distinguishing it from the adjoining ground as a place of burial."); *Vidrine v. Vidrine*, 225 So.2d 691, 697 (La. App. 3d Cir. 1969), *writ refused*, 227 So.2d 594 (La. 1969) ("This dedication is in the nature of an irrevocable covenant running with the land. It is a real right, not a servitude or usufruct, but an implied contractual relationship that binds the owner irrevocably. . . . The owner is bound to the following: (1) He cannot remove or disturb any grave. (2) Relatives and friends have unrestricted rights to visit and care for the graves. (3) Property included in the cemetery cannot be used by the owner for any purpose inconsistent with cemetery purposes. (4) The owner cannot reduce the size of the lands set apart as a cemetery."); *Bitney v. Grim*, 144 P. 490, 491 (Or. 1914) ("Having been thus dedicated by the owner of the fee, the premises are subject to that use so long as bodies remain buried there and until they are removed by public authority or by friends or relatives. . . . But until its depopulation as a city of the dead is complete by one or the other process, the ground dedicated for the last resting place of deceased persons must remain true to its dedication. Although the tract in dispute has been grossly neglected, yet we think the testimony clearly establishes that it yet remains a cemetery and must be respected as such.").

law as adopted in the Commonwealth of Pennsylvania is more appropriately resolved in state court.[11]

ARGUMENT

I. Real property that contains human remains is subject to unique common law doctrines that limit the rights of the fee owner to exclude others.

The common law of real property contains unique doctrines that apply only to real property containing human remains.[12] The idea that burial grounds are a

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[11] *See, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.").

[12] *See, e.g.*, Tanya D. Marsh, *When Dirt and Death Collide Legal and Property Interests in Burial Places*, Prob. & Prop., March/April 2016. Similar doctrines apply at civil law. *See* Ryan M. Seidemann, *Requiescat In Pace: The Cemetery Dedication and*

unique subclass of real property is a concept that can be traced through the common law to English ecclesiastical law, Catholic canon law, and finally to the law of Ancient Rome.[13] When human remains are intentionally placed in real property with the consent of the owner, the common law recognizes that the character of such real property has been fundamentally and perpetually transformed.[14] The common law of burial places has a rich history, but it has long been neglected by legal scholars.[15]

There are two major sources of the law of burial places in the United States: the common law, which varies from state to state, and state statutory law. Until the late 19th century, the law of burial places was almost exclusively common law. In the 19th and 20th centuries, the establishment of large, secular, privately

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Its Implications for Land Use In Louisiana and Beyond, 42 WM. & MARY ENVTL. L. & POL'Y REV. 895 (2018).

[13] Tanya D. Marsh and Daniel Gibson, CEMETERY LAW: THE COMMON LAW OF BURYING GROUNDS IN THE UNITED STATES (2015). *See also* Seidemann, *Requiescat In Pace* (reviewing the development of the uniqueness of cemetery property law in the civil law traditions).

[14] Percival Jackson, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 248 (2nd ed. 1950) ("We emphasize a basic principle of the law of burial that, whatever may be the mode of acquisition, and whatever the title acquired, once land has been devoted to burial it no longer is subject to mere rules of property law.").

[15] Prior to the publication in 2015 of THE LAW OF HUMAN REMAINS and CEMETERY LAW: THE COMMON LAW OF BURYING GROUNDS IN THE UNITED STATES, the most recent treatise on cemetery law in the United States was Percival Jackson's THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES (2nd ed. 1950).

owned burial grounds owned by for-profit and non-profit entities and open to the general public prompted most states to enact statutory regimes to govern the creation, management, and perpetual care of this class of burial grounds.[16]

But on a numerical basis, the vast majority of burial places in the United States were established informally.[17] They were not legally separated from a larger parcel of land, and burial rights were granted by the landowner to family and neighbors. These private burial grounds, like the one that is purportedly on Ms. Knick's property, are tucked into the corners of fields across the United States.[18] For example, in North

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[16] Marsh, *When Dirt and Death Collide*, supra n. 3 at 59. *See, e.g.*, George Wharton Pepper and William Draper Lewis, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM 1700 TO 1894, VOLUME I 513-16 (1896) (The Commonwealth of Pennsylvania adopted statutes regulating "cemetery companies" beginning in 1874.).

[17] *See* Jackson, THE LAW OF CADAVERS 216 ("The common cemetery in England was the parish graveyard in which every parishioner, without specified fault, was entitled to burial. The same was generally true in the United States in colonial times. But as the pioneer ventured westward and settled apart from neighboring habitations, he was frequently compelled to forego burial in the sacred ground of the place of common worship and to bury his dead in a secluded corner of his woodland lot. When proximity of neighboring settlers made a common burial ground possible, burials would often be made in a secular community graveyard.").

[18] David Charles Sloane, THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY 14-15 (1991) ("The lonely grave was soon replaced by clusters of graves as the pioneers' homesteads grew into small settlements. . . . Set among the trees on the outskirts of one of the fields, the domestic graveyard usually

Carolina, there are more than 30,000 informally recognized burial places,[19] but less than 200 cemeteries are "registered" with the state and regulated pursuant to the North Carolina Cemetery Act.[20] In Lackawanna County, Pennsylvania, the popular genealogy website *Find A Grave* lists 263 cemeteries, including a large number of small, primarily family cemeteries located on what is described on the site as a larger parcel of private property.[21]

Threats to burial grounds located on private land are, unfortunately, common.[22] Although various state

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occupied a high point on the land. Whether open for pasturing or enclosed by a stone wall, the graves were shaded by the trees ringing the field. Markers were placed irregularly around the small enclosure, with an occasional child's grave disturbing the line of the row because of the smaller size of the grave. The farmer periodically cut away the overgrown grass, and his wife tended any flowers inside the wall. . . . Domestic burial grounds were prevalent in all of the colonies. . . .").

[19] Cristine R. Dixon, *Deserting God's Acre: The Problem of Abandoned Cemeteries in North Carolina*, 6 WAKE FOREST J. L. & POL'Y S.S. 2 (2015).

[20] N.C. Gen. Stat. § 65-46 *et seq.* http://nccemetery.org/north-carolina-cemeteries/.

[21] https://www.findagrave.com/cemetery/search?locationId=county_2275.

[22] *See, e.g.*, Ed Donga, *6 Things to Know About the Cemetery Vandalism in West Bridgewater*, WICKED LOCAL (Mar. 15, 2016), http://bridgewaterwest.wickedlocal.com/article/20160315/NEWS/160316892 (last accessed Jul. 11, 2018) (discussing cemetery vandalism in Massachusetts); Shirley Ruhe, *Church and Preservationists Clash over Graveyard: Preserving cemetery would affect expansion plans*, ARLINGTON CONNECTION (Nov. 2, 2016), http://www.connectionnewspapers.com/news/2016/nov/02/church-and-preservationists-clash-over-graveyard/ (last accessed Jul. 11, 2018)

and federal laws have been enacted since the mid-1960s in an effort to protect graves from desecration,[23] burial grounds located on private land remain uniquely vulnerable.[24]

Dr. David Charles Sloane, who has written extensively about the history of the cemetery in the United States, has observed that these sacred spaces—especially those with no permanent grave marker—are at risk by their very nature:

(discussing troubles of development and cemeteries interacting in Virginia); John Ruch, *Grocery-anchored Sandy Springs project could replace apartments, displace historic cemetery*, REPORTER NEWSPAPERS (Apr. 19, 2018), https://www.reporternewspapers.net/2018/04/19/grocery-anchored-sandy-springs-project-could-replace-apartments-displace-historic-cemetery/ (last accessed Jul. 11, 2018) (discussing potential impacts to historic Georgia cemetery resulting from development); Miya Shay, *Historic cemetery found on construction site of Fort Bend ISD's future technology center*, KTRK NEWS (Apr. 11, 2018) http://abc13.com/society/historic-cemetery-found-on-ft-bend-isd-work-site/3329602/ (last accessed Jul. 11, 2018) (discussing complexities of cemetery/development interactions in Texas and elsewhere); Zack Hale, *Cemetery commissioners hope historic recognition reroutes gas pipeline*, THE DAILY NEWS (Mar. 22, 2018) https://tdn.com/news/local/cemetery-commissioners-hope-historic-recognition-reroutes-gas-pipeline/article_960e84e8-2ee2-5183-894f-ff131d000b7e.html (last accessed Jul. 11, 2018) (discussing interactions of development and cemeteries in Washington).

[23] *E.g.*, the National Historic Preservation Act of 1966, 54 U.S.C. § 300101 *et seq.*; the National Environmental Policy Act of 1970, 16 U.S.C. § 4321 *et seq.*; the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

[24] *See generally* Ryan M. Seidemann, *NAGPRA at 20: What Have the States Done to Expand Human Remains Protections?*, 33(2) MUSEUM ANTHROPOLOGY 199 (2010) (discussing the limited reach of federal human remains and cemetery protection laws).

> Until relatively recently, most Americans did not have permanent gravestones. They were too expensive. And of those that were erected, many have been lost over the centuries as the graveyard got in the way of progress or through the physical deterioration of memorials made of wood and fragile stones.
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> * * *
>
> The number of unmarked graves throughout history must reach into the millions. The financial ability to have a gravestone, and to have that gravestone survive wars, urban development, weather, even theft shrinks that number much further. . . . Chinese workers on the rail lines of the West, slaves throughout the Americas, seamen of all ethnicities, and many other primarily poor and minority peoples have had their graves built over, disturbed, unacknowledged, even purposefully destroyed.[25]

These burial grounds are protected in most states by statutes that criminalize unauthorized disinterment and grave desecration,[26] but their most

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[25] David Charles Sloane, IS THE CEMETERY DEAD?, 165-166, 216 (2018).

[26] *See, e.g.*, 18 Pa. Stat. and Cons. Stat. Ann. § 5509(a) (West) ("A person commits a misdemeanor of the second degree if he: (1) intentionally desecrates any public monument or structure, or place of worship or burial. . . ."); 18 Pa. Stat. and Cons. Stat. Ann. § 5509(a.1) (West) ("A person commits a misdemeanor of the first degree if the person intentionally desecrates a historic burial lot or historic burial place."). *See also* La. Rev. Stat. 14:101 (Louisiana's criminal desecration statute).

significant protection comes from the common law doctrines that grant rights to the deceased and to the living and the courts to protect them.

The common law provides that the "the dead . . . have rights, which are committed to the living to protect,"[27] most significantly, the right to an undisturbed repose in perpetuity. This right manifests itself in a common law which disfavors disinterment (*i.e.*, removal of human remains from a grave).[28]

In a 1926 disinterment case where a widow sought the court's permission to move her husband's remains from one cemetery to another, Justice Cardozo, then a member of the New York Court of Appeals, explained the general position of the common law on disinterment—"The dead are to rest where they have been laid unless reason of substance is brought forward for

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[27] *Thompson v. Hickey*, 8 Abb. N. Cas. 159, 166 (N.Y. Sup. Ct. 1880) (holding that it is "an offense against good morals to mortgage a small isolated plot of ground in a cemetery, dedicated exclusively, under the sanctions of the law, as a sanctuary for the dead of one's family, and already consecrated by the ashes of one's kindred, I am sure cannot be well questioned. Such a transaction is clearly a breach of the policy of the statute, is contrary to its equity, and is within the evils it was designed to cure, and our moral nature protests against it.").

[28] *Brewer v. Am. Med. Alert Group*, 2010 WL 280986, *2 (M.D. Tenn. 2010) ("it is well settled that 'the quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is sanctioned.'"). *See also Afalonis v. Afalonis*, 90 A.D. 3d 917 (N.Y. App. Div. 2011) (same); *Rinnier v. Gracelawn Mem'l Park Inc.*, 2015 WL 7568363 (Del. Ch. 2015) (same); *Manson v. Manson*, 31 N.Y.S.3d 922 (N.Y. Sup. Ct. 2015) (same).

disturbing their repose."[29] The leading case on disinterment in the United States is *Pettigrew v. Pettigrew*,[30] which was decided by the Supreme Court of Pennsylvania in 1904:

> The presumption is against a change. The imprecation on the tomb at Stratford, "Curst be he that moves my bones," whether it be Shakespeare's own or some reverent friend's, expresses the universal sentiment of humanity, not only against profanation, but even disturbance. When a case comes into court, the chancellor will regard this sentiment, and consider all the circumstances in that connection.[31]

The common law of the United States is of course derived from the common law of England as it existed at the end of the eighteenth century. At that time, England had an established church and the vast majority of those who died in that country were buried, pursuant to English ecclesiastical law, in the local churchyard. The states chose not to adopt English ecclesiastical law, which created a problem for early U.S. courts—in the absence of an established church that owned and had jurisdiction over the churchyards, which institution would protect the right of the dead to an undisturbed repose? In 1829, this Court provided

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[29] *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926).

[30] 56 A. 878 (Pa. 1904).

[31] 56 A. at 880.

the first answer—the courts of equity—in *Beatty v. Kurtz*.[32]

In 1856, the common law expanded to provide a second guardian of the rights of the dead—the living. In an eminent domain case in New York City, the court adopted a referee's report by Samuel B. Ruggles that established first, that "the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect," and second, that "such a right, in the absence of any testamentary disposition, belongs exclusively to the next of kin."[33] The so-called "Ruggles Report" was highly influential and the common law doctrines it established were adopted widely by state courts.[34] This right to "preserve the remains" of the dead is a foundation of the common law right to access graves.[35]

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[32] 27 U.S. 566 (1829).

[33] Samuel B. Ruggles, AN EXAMINATION OF THE LAW OF BURIAL, IN A REPORT TO THE SUPREME COURT OF NEW YORK IN THE MATTER OF TAKING A PORTION OF THE CEMETERY OF THE BRICK PRESBYTERIAN CHURCH, IN WIDENING BEEKMAN STREET, IN THE CITY OF NEW YORK 58 (1856).

[34] *See, e.g., Wynkoop v. Wynkoop*, 42 Pa. 293, 301 (1861); *Pettigrew v. Pettigrew*, 56 A. 878 (Pa. 1904); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 233 (1872); *Bogert v. City of Indianapolis*, 13 Ind. 134, 135 (1859); *Larson v. Chase*, 50 N.W. 238, 238 (Minn. 1891); *Johnston v. Marinus*, 1886 WL 6074 (N.Y. Sup. Ct. 1886).

[35] *See* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 B.Y.U. L. REV. 1469, 1497 (2006).

II. When Ms. Knick acquired her real property, it was subject to the common law protections afforded to cemeteries regardless of a formal dedication or record title.

> Where, by reason of operation of rules of real property resulting in dedication or other accepted methods of acquiring title to or easement in lands, or by reason of the effect of interment under rules of burial law, land has become charged with a right of burial use, the fee, if alienable, passes to a grantee subject to the burial rights.[36]

Beatty v. Kurtz established the principle that the courts of equity have the authority to protect burial grounds, the desecration of which is a "public nuisance." Perhaps because the courts cannot actively monitor burial grounds, courts across the United States have acknowledged for centuries that the kin of the deceased and, in some states, the general public, have the right to access burial places, even those located on private land, to maintain and protect the graves.

The leading common law case on this subject is *Hines v. State*.[37] In that case, the Tennessee Supreme Court, observed that:

> When land has been definitely appropriated to burial purposes, it cannot be conveyed or

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[36] Jackson, supra n. 14 at 250.

[37] 149 S.W. 1058, 1059 (Tenn. 1911).

> devised as other property, so as to interfere with the use and purposes to which it has been devoted. When once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust. The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.[38]

This acknowledgement of the cemetery dedication at common law illustrates that the Ordinance is hardly "extraordinary." The Ordinance is consistent with well-established common law that recognizes implied servitudes under certain conditions, such as the presence of a burial ground on private land. The Ordinance did not create the burden of a right of access to burial grounds located on private property. Ms. Knick, like thousands of similarly-situated landowners across the United States, was burdened with this implied servitude when she acquired the subject property. Accordingly, as noted in the Respondents' merits brief in this matter, the pre-existing common law burden imposed on owners of burial grounds encompasses most, if not all, of the Ordinance, thus meaning that the Ordinance's

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[38] *Id.*

enactment and application does not constitute a taking under the jurisprudence of this Court.[39]

Not only does the *Hines* Court support the notion that property such as Ms. Knick's is burdened with restrictions to protect against adverse impacts to the burial ground thereon, the Court further went on to state that:

> [The descendants] also have the right to visit the cemetery for the purpose of repairing, beautifying, and protecting the graves and grounds around the same, and for these purposes they have the right of ingress and egress from the public road nearest the cemetery, to be exercised at reasonable times and in a reasonable manner.[40]

Thus, in addition to concisely articulating the existence of the cemetery dedication as a pre-existing incident of property ownership, the *Hines* Court also acknowledged the correlative burden placed on the owners of burial grounds to permit access to that property for the purposes of visitation and maintenance.

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[39] Respondents' Merits Brief at 48 (citing the holding in *Lucas v. S. Car. Coastal Council*, 505 U.S. 1003, 1031 (1992), in which this Court observed that pre-existing legal burdens on property do not constitute takings).

[40] *Hines*, 149 S.W. at 1059.

Summarizing these burdens, the *Hines* Court held that:

> Those who purchase the property after it has been appropriated to burial purposes take it subject to the rights we have stated, without any express reservation in the will or deed under which they take. Such reservation is implied. The graves are there to be seen, and the purchaser is charged with notice of the fact that the particular lot has been dedicated to burial purposes, and of the rights of descendants and relatives of those there buried. Burial lots, whether public or private, are not the subject of trade and commerce, and it is always presumed that they are not included in the sale of property which surrounds them.[41]

Hines has been cited in common law right of access cases in Florida,[42] Georgia,[43] Kansas,[44] Kentucky,[45]

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[41] *Id.*

[42] *Mingledorff v. Crum*, 388 So.2d 632, 635–636 (Fla. Dist. Ct. App. 1980).

[43] *Haslerig v. Watson*, 54 S.E.2d 413 (Ga. 1949).

[44] *McCoy v. Barr*, 275 P.3d 914, 923 (Kan. App. 2d 2012).

[45] *Commonwealth v. Garner*, 896 S.W.2d 10, 13 (Ky. 1995).

Massachusetts,[46] Missouri,[47] Oklahoma,[48] and Texas.[49] Identical concepts exist in the civil law system.[50]

Other cases, while not citing *Hines*, certainly echo its sentiment. In *Humphreys v. Bennett Oil Corp.*,[51] a mineral production company sunk two oil wells into a rural cemetery in Louisiana.[52] When descendants of those interred in the cemetery sued the production company for, among other things, mental anguish, the Louisiana Supreme Court reacted harshly, with an uncharacteristically editorial decision. The court explicitly addressed the concept of the cemetery dedication when it stated the following:

> Regardless of the laws and rules relating to the ownership and control of real property, when a plot of ground is set apart for cemetery purposes, and burials are made in the land, the ground changes its character in the minds

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[46] *Sanford v. Vinal*, 552 N.E.2d 579, 585 (Mass. App. Ct. 1990).

[47] *Rhodes v. Nicklas*, 624 S.W.2d 504, 507–508 (Mo. Ct. App. 1981).

[48] *Heiligman v. Chambers*, 338 P.2d 144, 147–148 (Okla. 1959).

[49] *Davis v. May*, 135 S.W.3d 747, 750 (Tex. App. 2003); *White v. Williams*, 57 S.W.2d 385, 386 (Tex. Civ. App. 1933).

[50] La. Atty. Gen. Op. No. 08-0186; Ryan M. Seidemann, *Do Not Disturb: A Practical Guide for What Not to Do Around Cemeteries and Human Remains for the Louisiana Energy and Land Use Practitioner*, 2 LSU J. OF ENERGY L. & RESOURCES 239, 246-248 (2013).

[51] 197 So. 222 (La. 1940).

[52] *Id.* at 223.

> and feelings of the community. "It assumes a sacred quality that overrides conveyancers' precedents and requires freedom from profanation until, by abandonment and removal of the bodies or by complete disintegration, there remains nothing to appeal to the emotions of the survivors."[53]

With the above statement, the Louisiana Supreme Court unequivocally recognized that the presence of a cemetery on a tract of land fundamentally changes the character of that land such that the land cannot be used for anything other than a cemetery.

In *A.F. Hutchinson Land Co., Inc. v. Whitehead Bros. Co.*,[54] a New York court observed that land is dedicated as a cemetery by use of the property for cemetery purposes—the burial of human remains in or on the property.[55] Such a dedication "is a privilege or a license, not only to bury the dead . . . , but also the right of the living to place monuments or suitable decorations over the graves of their dead as memorials, and to preserve and beautify the premises."[56] In this case, the court relied on the CORPUS JURIS' statement that "[s]o long as a cemetery is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or

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[53] *Humphreys v. Bennett Oil Corp.*, 197 So. 222, 229 (La. 1940) (*quoting* Percival E. Jackson, THE LAW OF CADAVERS AND OF BURIALS AND BURIAL PLACES, 206 (1st ed. 1936)).

[54] 218 A.D. 682 (N.Y. App. Div. 1926).

[55] *Id.*

[56] *Id.* at 684.

recognized by the public as a cemetery, it is not abandoned" when commenting that the cemetery dedication is virtually permanent.[57]

In *Haslerig v. Watson*,[58] a landowner acquired land surrounding a cemetery that had been dedicated for public use. The landowner obstructed the roadway leading to the cemetery and was planning to build a fence when the plaintiffs sought injunctive relief to protect access to the site. The Georgia Supreme Court upheld the access rights of the descendants to the cemetery, finding that the land had been dedicated to such a use and that access to the property could not later be restricted once interments had been made.[59]

A similar concept exists in Pennsylvania where the current case is situated. In the matter of *In re Hunlock's Creek Cemetery*,[60] the court observed that a dedication of land to cemetery purposes requires no formality and that it occurs by operation of law *once burials are made*.[61]

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[57] *Id.* at 685.

[58] 54 S.E.2d 413 (Ga. 1949).

[59] *See also Garland v. Clark*, 88 So.2d 367 (Ala. 1956) (similar facts and same outcome).

[60] 16 Pa. D. & C. 152 (Penn. Ct. Comm. Pleas, Luzerne Cty. 1930).

[61] *Id.* at 153-154. *See also Roundtree v. Hutchinson*, 107 P. 345, 347 (Wash. 1910) ("It is true that there are no reservations in the deeds in the appellant's chain of title, but both he and his grantor, Wooley, had notice of the existence of the burying ground, and purchased subject to the rights the public had acquired in the property.").

As Justice Oliver Wendell Holmes observed, "[s]ince, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World."[62] Justice Holmes could not have been more correct and the cases reviewed above support this notion by demonstrating that the Ordinance at the core of this current dispute is merely a recitation of long-held common law concepts for the management and protection of the spaces of the dead. Accordingly, such restrictions and other burdens on private property for the protection and preservation of cemeteries are neither unreasonable nor inconsistent with the limitations on the uses of certain property that are recognized as permissible under the United States Constitution.

III. Many states have codified the common law right of access; none have been held to be takings.

Professor Alfred Brophy explained the common law right to access cemeteries in a 2006 law review article.[63] Professor Brophy noted that where burial grounds are located on private property, a conflict often arises between "the right of property owners to exclude and the veneration of age and of ancestors."[64] This

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[62] *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 366 (1910).

[63] Brophy, *Grave Matters*, supra n. 35.

[64] *Id.* at 1470.

conflict has resulted in the recognition by courts that "[r]elatives of people buried in cemeteries on private property have a common law right to access the property to visit the cemetery."[65] Brophy found that the right, which he characterizes as an implied easement in gross, is also codified in about 20% of the states.[66] The Pennsylvania General Assembly codified the right of access to burial grounds in 2017, stating that "every individual has a right to reasonable access for visitation to a burial plot" on private property.[67]

These statutes, many of which grant rights of access to the public and not simply the descendants of the deceased, have been challenged in a handful of jurisdictions. No state or federal court has yet held that a codification of the common law right of access constitutes a taking.[68]

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[65] *Id.* at 1472. *See also* La. Atty. Gen. Op. No. 08-0186 for a similar analysis of the access concept at civil law.

[66] *Id. See, e.g.*, Ala. Code 1975 § 35-1-4; Fla. Stat. Ann. § 704.08; Mo. Ann. Stat. § 214.132; N.C. Gen. Stat. Ann. § 65-102; S.C. Code Ann. § 27-43-310; Tex. Health & Safety Code Ann. § 711.04; Va. Code Ann. § 57-27; W. Va. Code Ann. § 37-13A-1.

[67] Act of Dec. 21, 2017, Pub. L. No. 1205, No. 64 § 2, codified at 9 Pa. C.S. § 702(1).

[68] *See* Ryan M. Seidemann, *How Do We Deal With All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 UNIV. OF BALTIMORE J. LAND & DEVELOP. 1 (2013); National Trust for Historic Preservation, *Minnesota Court Dismisses Inverse Condemnation Challenge to State Human Remains Statute*, 9(12) PRESERVATION LAW REPORTER 1158 (1990) (Minnesota).

In *Narragansett Improvement Co. v. Wheeler*,[69] the Rhode Island Supreme Court was presented with the question whether a government entity's identification of cemeteries on private property constituted a slander of the private party's title.[70] The identified cemeteries were Native American burial mounds that were documented on private property to assist in their protection.[71] In that case, as here, the court noted that because the documentation of these mounds was not a legal registration, no constitutional claims could lie against such action by the government.[72] Further, the court found that there was no slander of title by recommending the preservation of these sites, as the recommendations were not false and because the recommendations merely identified actual features on the property (*i.e.*, the cemeteries)[73] that, if they devalued the property, they did so regardless of the government's recommendations.[74] This outcome correctly absolved the government of liability for a taking[75] and is

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[69] 21 A.3d 430 (R.I. 2011).

[70] *Id.* at 432.

[71] *Id.* at 442-443.

[72] *Id.* at 439-441.

[73] *See Breneman v. United States*, 57 Fed.Cl. 571, 585 (2005) (holding the Federal Aviation Administration's determination that a hill and a fence on a plaintiff's property would constitute a hazard to air navigation did not amount to a "taking" because it had "no enforceable legal effect").

[74] *Narragansett*, 21 A.3d at 441-442.

[75] *Id.*

consistent with the idea that burial sites are generally inviolate[76] and that property owners acquire property subject to the possible existence of burials thereon.

Similarly, in *Thompson v. City of Red Wing*,[77] a Minnesota appeals court observed that a law protecting human burials on private property did not rise to the level of an inverse condemnation. In so finding, the court held that such a regulation did not cause the landowners to be "deprived of all reasonable use"[78] of their land.

In *Davis v. May*,[79] the Court of Appeals of Texas considered whether Section 711.041 of the Texas Health and Safety Code, which provides in part that "[a]ny person who wishes to visit a cemetery or private burial grounds for which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds," was unconstitutional and whether "the granting of a right of ingress and egress across the Davises' land is an unconstitutional taking of their property."[80] The court concluded:

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[76] *See, e.g., Choppin v. Labranche*, 20 So. 681, 682 (La. 1896) (discouraging the disturbance of the dead except for "lawful necessary purposes"); *see also* T. Scott Gilligan & Thomas F.H. Stueve, MORTUARY LAW 49-53 (9th ed. 2005) (noting that disinterment is generally disfavored).

[77] 455 N.W.2d 512 (Minn. Ct. App. 1990).

[78] *Id.* at 516.

[79] *Davis v. May*, 135 S.W.3d 747 (Tex. App. 2003).

[80] *Id.* at 748.

> Because May and the other relatives of the decedents have a common law right of ingress and egress and because the Davises' title to the property was already burdened by this common law right, neither section 711.041 nor the trial court's ruling resulted in a "taking" of the Davises' property under the facts as presented. As a result, section 711.041 is constitutional as applied in this case, and no taking occurred.[81]

Laws similar to the challenged Ordinance have been subject to takings examinations by state courts in the past and they consistently pass muster. Again, there is nothing in the Ordinance that is "extraordinary" or "constitutionally suspect," as it was characterized by the Third Circuit. Ms. Knick owns property that contains a burial ground and, as a result, she must endure some amount of intrusion to ensure that the sacred and sensitive nature of the property remains intact and that the rights of the dead to an undisturbed repose are respected.

CONCLUSION

The protection of human burial grounds is a matter of "respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations."[82] As this review demonstrates, the Ordinance is not "extraordinary." There is no precedent for

[81] *Id.* at 751.

[82] La. Rev. Stat. 8:672 (La. Acts 1991, No. 704).

Petitioner's claim that the Ordinance constitutes a taking under *Lucas*, as it is largely consistent with a long-standing, pre-existing incident of her property ownership. Indeed, the robust common law doctrines protecting the dead and the right of access strongly suggest that the Ordinance simply codified the common law of the Commonwealth of Pennsylvania. Accordingly, regardless of this Court's holdings with respect to the specific *Williamson County* questions presented by the parties, *amici* urge this Court to recognize that whether the Ordinance extends beyond the common law is a question more appropriately resolved in state court.

Respectfully submitted,

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